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Grafstein v. Holme and Freeman

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GRAFSTEIN V. HOLME AND FREEMAN — PERSONAL PROPERTY — DE FACTO POSSESSION — DISTINCTION BETWEEN PUBLIC AND PRIVATE PLACE — RIGHTS OF FINDER VERSUS TRUE OWNER — The recent Court of Appeal decision in *Grafstein v. Holme and Freeman*[1] is the first reported Ontario case to deal with the problem of the right to lost property where there are conflicting claims between the finder of the lost property, and the owner or occupier of the place wherein the property was found.[2] In the case of *Bird v. The Town of Fort Frances*[3] an earlier Ontario decision, the issue involved was whether a trespasser who took the lost money from the land of another, was entitled to it as against the Town.[4] In the *Grafstein* case, the claim was between the finder of money and the owner of the premises on which the money was found, a fact situation similar to that in the leading case of *Bridges v. Hawkesworth*.[5]

The appellant Holme began working in the respondent's dry goods store on September 23, 1953. On the same day, while cleaning up the basement, which was one of Holme's duties, he came across a padlocked metal box covered with rubbish. He took the box to Grafstein, who told him to put it on a shelf and leave it there. Holme did as he was told and Grafstein denied ownership of the box suggesting that it probably contained carpenter's tools, since substantial alterations had been made to the store in the previous year. Grafstein claimed to have known the box was there since 1951, but the trial judge accepted Holme's statement that he found it under a pile of rubbish and had taken it to Grafstein.

The appellant, Freeman, started to work in Grafstein's store in the spring of 1955 and seemed to know of the box at that time. On December 31st, 1955, when the two employees were putting away Christmas decorations, their curiosity got the better of them and they sawed the lock off the box. To their surprise, they found approximately $38,000.00 in neat bundles. They bought a new lock and replaced the box on the shelf. After the store closed, the appellants told Grafstein of their find and suggested they divide the money equally among themselves. Grafstein thought it better, "to leave it the way it is", and after supper they all returned to the store where Grafstein's lawyer was present. The lawyer turned the money over to the police on the understanding that if the true owner was not found, the money was to be returned. When the true owner could not be found, the police turned the money over to the Public Trustee who was ordered to pay the money into court. In an interpleader action, it was decided that Grafstein was entitled to the money, and Holme and Freeman appealed that decision.

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1 [1958] O.R. 296. The trial judgment is reported in [1957] O.R. 354.
2 See generally, Three Cases on Possession (1929), 3 Camb. L.J. 195; Todd (1957), 35 Can. Bar Rev. 962; Sommerfield (1958), 36 Can. Bar Rev. 558.
3 [1949] O.R. 292.
4 See Todd, *ante* footnote 2, where the *Grafstein* and *Bird* cases are compared.
5 [1852] 21 L.J.Q.B. 75; 15 Jun. 1079.

The trial judge felt that the money was not "lost" since it was carefully sorted into packages and placed in the box. He attempted to create an intermediate classification between "lost"and "not lost" property. This distinction seems to be similar to the doctrine of "misplaced" property which has been applied in the United States.[6] Fortunately, the Court of Appeal found the box to be "lost"[7] and thus averted the introduction of an intermediate classification into the law of Ontario.

The appellate Court also considered whether possession of the box gave possession of the money as well. There is no clear law on the subject,[8] but the court felt that there was a rebuttable presumption that a person who had possession of the receptacle also had possession of the contents.[9] The judgment does not tell us whether this presumption was applied, but since the Court of Appeal decided the case on the question of who had possession of the box at the time of the finding of the money and not at the time of the finding of the box, it would appear that the presumption was not applied.

Although it is often said that when a servant finds a lost article in the course of his employment, he finds it for his master,[10]the writer can find only one case in which the decision was clearly based on this proposition. In *McDowell v. Bank of Ulster*[11], the bank succeeded against its caretaker in recovering £25 which he found, and the court gave judgment on the basis of the master-servant relationship. In the *Grafstein* case, Lebel J.A. hints that a claim based on a master-servant relation would not succeed.[12]

In discussing the judgment of Lord Russell of Killowen in the *Sharman* case, LeBel J.A.[13] points out that the principle of that case was based on the statements of Pollock and Wright.[14]

> "The possession of land carries with it in general, by our law, possession of everything which is *attached to or under that land*, and in the absence of a better title elsewhere, the right to possess it also."

The Ontario Court of Appeal seemed to accept this statement.

LeBel J.A. discussing the *Sharman* case points out that Lord Russell extended the original statement by Pollock and Wright:

> " . . . but the general principle seems to me to be that where a person has possession of a house or land, with a manifest intention to exercise

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[6] See Brown, Personal Property (1936), 3rd ed., at p. 25 for a good discussion of the doctrine of misplaced property and *Heddle v. Bank of Hamilton*, [1912] 5 D.L.R. 11, where the doctrine was applied in a British Columbia case.

[7] *Ante* footnote 1 at p. 302.

[8] See generally Paton, Bailment In the Common Law (1952), at p. 120 and *Meny v. Green*, [1841] 7 M. W. 623; 151 E.R. 916.

[9] *Ante* footnote 1 at p. 306.

[10] See Todd, *ante* footnote 2 and Brown, *ante* footnote 6. See also *Hannah v. Peel*, [1945] K.B. 509 at p. 519 where Birkett J. feels that this is a sufficient explanation of the *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44 case, even though it is not the ratio.

[11] [1899] 33 Ir. L.T. 225.

[12] [1958] O.R. 296 at p. 311.

[13] *Ibid.*, at p. 305.

[14] Pollock and Wright, Possession in the Common Law (1888), at p. 41.

> control over it and the things which may be upon or in it, then if something is found on that land, whether by an employee of the owner, or by a stranger, the presumption is that that thing is in the owner of the locus in quo."[15]

Mr. Justice LeBel says:

> ". . . I do not think anyone could seriously quarrel with the principle . . . so long as it is established in evidence as a basis for the presumption that the occupier has in fact the possession of the house or land with manifest intention to exercise control over it (i.e. the land or the house) and the things which may be upon or in it . . . there must then be a natural presumption of possession in favour of the person in occupation . . ."[16]

After stating the presumption and the rebuttals made by the appellants, it appears that the court did not use this presumption as a basis for giving judgment. Is it necessary to bring the presumption ("natural" or otherwise) into our law? The decision in this case gives us principles (which will be shown) on which to decide a dispute of this kind and, the facts of an individual case will determine the claim on the basis of these principles without the necessity of introducing such a presumption.

The appeal court attempted to discover the true basis of the decision in the leading case of *Bridges v. Hawkesworth*.[17] In that case, the plaintiff picked up a package containing bank notes which had accidently been dropped on the floor of the defendant's store. The plaintiff handed the notes over to the owner of the store to find the true owner. After advertising unsuccessfully for the true owner, the plaintiff demanded the notes and the shopkeeper refused.
Patterson J. said:

> The notes never were in *the custody of the defendant,* nor within the protection of his house, before they were found . . . and the defendant has *come under no responsibility* except from the communication made to him by the plaintiff, the finder . . .[18]

Consequently, the plaintiff got the money as against all persons except the real owner. The Ontario Court of Appeal correctly pinpointed the ratio of the judgment (which eluded Lord Russell in the *Sharman* case) by saying:

> . . . the shopkeeper had not the custody and owed no duty to the real owner . . .

Surprisingly the court continues:

> . . . because no one had communicated to him the fact that the parcel of bank notes was on the floor of the shop. If this is the gist of the ratio as I think it is . . . the occupier's ignorance of the existence of the lost article distinguishes *Bridges v. Hawkesworth* and *Hannah v. Peel,* which followed it, from the *Sharman* case, the *Elwes v. Brigg* case, and *Reg. v. Rowe*[19]

It is difficult to see how communication or lack of communication to the occupier of land, regarding the lost article, can be the distinction

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15 [1896] 2 Q.B. 44 at p. 47.
16 *Ante* footnote 12 at p. 305.
17 *Ante* footnote 5.
18 *Ibid.,* at p. 1082.
19 *Ante* footnote 1 at pp. 307-308.

between the cases mentioned, since in all of these cases the occupiers never knew of the existence of the lost article until it was found. In *Bridges v. Hawkesworth,* the owner of the store did not know of the lost money until the finder brought it to him. In *Hannah v. Peel*[20] the owner of the requisitioned house knew nothing of the valuable broach until the authorities notified him that a soldier had found it in a window casement. Also in the *Sharman* case, the owners of the pool knew of no rings until their employees found them. In *Elwes v. Brigg Gas Company,*[21] the owner of the land did not know of the prehistoric boat until the tenant dug it up. Similarly, in *Reg. v. Rowe,*[22] the canal company did not know about the stolen iron until the police found the accused. However, although communication to the occupier of land does not seem to be the ratio of *Bridges v. Hawkesworth,* nor the distinguishing feature between the other cases, communication will be a factor in determining who has custody of the lost article.

The court applied the ratio in *Bridges v. Hawkesworth* in coming to their decision:

> (1) . . . it must be concluded that the respondent had *de facto* possession or custody of both the box and contents on 31st December, 1955, the date the appellants made their discovery . . .[23]

and

> (2) . . . I am satisfied that he under took its custody and assumed the legal responsibility of a finder . . .[24]

Then why did the result differ from *Bridges v. Hawkesworth*? In that case, the court applied the above principles to the time when the package was found and seemed to ask whether the shopkeeper had custody of the package and owed a duty to the true owner at the time the finder picked the package up. In the *Grafstein* case, the court seemed to ask these questions at the time the box was broken into and the money discovered, a date two years after the box was first discovered by Holmes. It appears that Grafstein did not have custody of the box nor did he owe a duty to the true owner until Holme followed Grafstein's instructions and put the box on the shelf. The court never explains why it did not consider applying these principles to the time Holme first found the box.[25] The time at which the court applied the principles determined the result of the case, but why did the court apply the principles to the time the money was discovered and not to the time when the box was first found?

The Ontario Court of Appeal has stated; (1) that things found *in or attached to land* are in the possession of the occupier or owner

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20 [1945] K.B. 509.
21 (1886), 33 Ch. D. 562.
22 (1859), Bell C.C. 93; 169 E.R. 1180.
23 [1958] O.R. 296 at p. 311. Here the Court equates "custody" (from *Bridge v. Hawesworth*) and *de facto* possession (from Pollock and Wright). In the writers opinion, Professor Goodheart would take exception to this because *de facto* possession is not found in the judgment of the *Hawkesworth* case.
24 *Ibid.,* at p. 309.
25 Possession of the box would give possession of the contents.

of the land, (2) that when things are found *on land* with a manifest intention to control, then there is a presumption that the occupier has possession of the article, but that this presumption may be rebutted. In the *Grafstein* case we were not concerned with things attached to land and we were never told whether the presumption was applied. Grafstein received the money because at the time the money (not the box) was discovered, he had *de facto* possession since Holme turned the box over to him two years earlier and Grafstein was under a legal obligation to the true owner. When dealing with a claim for lost property found on land, perhaps the fact that one party is the occupier of land is not as important as it was before. *Grafstein v. Holme & Freeman* indicates that custody of the article and an obligation to the true owner are the tests and the mere occupation of the land on which the article was found may only be a factor to be considered with other facts in determining who had custody of the article.

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